Nicholas Tan Chye Seng v Au Gek Wee (No 2)

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO 24–149–07 OF 2013
NORAINI ABDUL RAHMAN J
23 OCTOBER 2013

Civil Procedure — Contempt of court — Failure to comply with court order — Whether party in contempt for failing to obey court order could not be heard until contempt purged — Whether stay of proceedings could not be granted because decision concerned not appealed against — Courts of Judicature Act 1964 s 73

The defendant wife ('DW') had taken the son ('Aydan') from her marriage to the plaintiff husband ('PH') out of jurisdiction to Singapore without PH's knowledge or consent. PH was granted an ex-parte interim order ('the order') for interim custody of Aydan and for DW to bring him back to Malaysia. The order was served on DW in Singapore together with the cause papers for the inter-partes hearing of PH's custody application ('encl 1'). Instead of complying with the order, DW's lawyers appeared on the inter-partes hearing of encl 1 to dispute the court's jurisdiction to hear the matter and sought an adjournment to make a formal application. The court postponed the hearing for two days within which time DW's lawyers formally applied (vide encl 37) to stay the proceedings on the ground the court had no jurisdiction. Enclosure 37 was dismissed for the reason that until DW had purged her contempt with regard to her failure to obey the order, she had forfeited, if not postponed, her right to be heard. As soon as encl 37 was dismissed, DW's lawyers left the court without participating in the inter-partes hearing of encl 1. In their absence, an order in respect of encl 1 was made. The instant application ('encl 48') by DW was to stay that order and all orders made by the court subsequent to the dismissal of encl 37 until DW's appeal to the Court of Appeal against the dismissal of encl 37 was determined.

Held, dismissing the defendant's application with costs of RM5,000:

(1) Enclosure 48 sought to stay the order made with regard to encl 1. But there was no appeal filed against that order. DW's appeal was only against the dismissal of encl 37. Applying s 73 of the Courts of Judicature Act 1964, no stay could be granted especially when there was no appeal against the decision made (see para 13).

(2) Furthermore, as at the date of submission for encl 48, DW had still not complied with the order granted in respect of encl 1. Applying the principles enunciated in the case of *Wee Choo Keong v MBF Holdings &*

Anor and another appeal [1993] 2 MLJ 217 (concerning disobedience of court orders), the Court could not hear encl 48 (see para 15).

[Bahasa Malaysia summary

Defendan isteri ('DI') telah membawa anak ('Aydan') dari perkahwinannya dengan plaintif suami ('PS') di luar bidang kuasa ke Singapura tanpa pengetahuan atau persetujuan PS. PS telah diberikan suatu perintah interim ex parte ('perintah') untuk hak jagaan sementara Aydan dan untuk DI untuk membawa Aydan semula ke Malaysia. Perintah itu telah disampaikan kepada DI di Singapura bersama-sama dengan kertas kausa bagi pendengaran permohonan inter partes jagaan PS (' lampiran 1'). Dari mematuhi perintah itu sebaliknya, peguam DI muncul pada pendengaran inter partes lampiran 1 untuk mempertikaikan bidang kuasa mahkamah untuk mendengar perkara itu dan meminta satu penangguhan untuk membuat permohonan rasmi. Mahkamah menangguhkan perbicaraan selama dua hari di mana pada masa tersebut peguam DI secara rasmi memohon (vide lampiran 37) untuk menangguhkan prosiding atas alasan mahkamah tidak mempunyai bidang kuasa. Lampiran 37 telah ditolak atas alasan bahawa sehingga DI membersihkan penghinaannya berkaitan kegagalannya untuk mematuhi perintah, dia telah dilucuthakkan, jika tidak ditangguhkan, haknya untuk didengar. Sebaik sahaja lampiran 37 ditolak, peguam DI itu meninggalkan mahkamah tanpa menyertai pendengaran inter partes daripada lampiran 1. Dalam ketidakhadiran mereka, suatu perintah berkenaan dengan lampiran 1 telah dibuat. Permohonan ini ('lampiran 48') oleh DI adalah untuk menangguhkan perintah dan segala perintah yang dibuat oleh mahkamah berikutan pengguguran lampiran 37 sehingga rayuan DI kepada Mahkamah Rayuan terhadap pengguguran lampiran 37 ditentukan.

Diputuskan, menolak permohonan defendan dengan kos sebanyak RM5,000:

(1) Lampiran 48 meminta untuk penangguhan perintah yang dibuat berhubung dengan lampiran 1. Tetapi tidak ada rayuan difailkan terhadap perintah itu. Rayuan DI adalah hanya terhadap pengguguran lampiran 37. Mengguna pakai s 73 Akta Mahkamah Kehakiman 1964, tiada penangguhan boleh diberikan terutama apabila tidak ada rayuan terhadap keputusan yang dibuat (lihat perenggan 13).

(2) Tambahan pula, pada tarikh penghujahan untuk lampiran 48, DI masih belum mematuhi perintah yang diberikan berkaitan dengan lampiran 1. Mengguna pakai prinsip-prinsip yang dinyatakan dengan jelas dalam kes *Wee Choo Keong v MBF Holdings & Anor and another appeal* [1993] 2 MLJ 217 (tentang keingkaran perintah mahkamah), mahkamah tidak dapat mendengar lampiran 48 (lihat perenggan 15).]

Notes

For cases on failure to comply with court order, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2085–2088.

Cases referred to

Wee Choo Keong v MBF Holdings & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 24(d), 73
Law Reform (Marriage and Divorce) Act 1976

Y N Foo (Y N Foo & Partners) for the plaintiff.
Nicole Wee (Chooi & Co) for the defendant.

Noraini Abdul Rahman J:

[1] This is an application by the defendant wife ('DW') at encl 48 for the following reliefs:

(a) that the order of the court made on 21 August 2013 in respect of the originating summons dated 17 July 20113 in these proceedings be stayed pending the determination of the defendant's appeal to the court of appeal pursuant to the notice of appeal dated 26 August 2013;

(b) that any and all other orders of the court made on 21 August 2013 after dismissal of the defendant's application dated 20 August 2013 be stayed pending the determination of the defendant's appeal to the Court of Appeal pursuant to the notice of appeal dated 26 August 2013;

(c) that the costs of and incidental to this application be paid by the plaintiff to the defendant; and

(d) such further and/or other relief(s) as may be deemed suitable by this honourable court.

[2] At the beginning of submission it was indicated to the court that the plaintiff husband ('PH') was raising a preliminary objection but having clarified the situation from both sides, the PH's counsel said she was submitting both on the preliminary objection as well as the substantive application for stay at encl 48.

BACKGROUND

[3] 28 June 2013 — DW had taken the son of the marriage Aydan to Singapore without the PH's knowledge or consent.

[4] 17 July 2013 — PH filed encl 1.

[5] 19 July 2013 — PH was granted ex parte interim orders for, inter alia, interm custody of Aydan and for Aydan's return to Malaysia.

[6] 31 July 2013 — Cause papers served on the DW in Singapore.

[7] 19 August 2013 — Case fixed for inter parte hearing of encl 1 but to DW's solicitors appeared and informed the court that she was disputing the Malaysian court's jurisdiction on the matter and sought an adjournment to make the necessary application. Court directed the DW to file her application by 20 August 2013 and had fixed all applications to be heard on 21 August 2013, including the inter parties of the custody application and the originating summons.

[8] 21 August 2013 — The court heard the DW's application (encl 37) for stay on the basis that the Malaysian court has no jurisdiction and other prayers. This court then dismissed the DW's application at encl 37 with cost of RM5,000. In the court's written judgment dated 22 August 2013, amongst the reason given was that having traced and dealt with the facts, the statutes ie s 24(d) of the Courts of Judicature Act 1964 and the relevant sections of the Law Reform (Marriage and Divorce) Act 1976 and the relevant case laws in particular the decision of the Supreme Court in the case of *Wee Choo Keong v MBF Holdings Bhd and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210, this court had dismissed the DW's application at encl 37. This court is of the opinion that the DW had not complied with the court order and therefore she 'has to a certain extent, forfeited his (her) right to be heard or at least postponed that right until (she) has suitably purged his (her) contempt'. The court then dismissed the DW's application at encl 37.

[9] The DW then filed an appeal against the decision and that appeal is still pending.

[10] Now, the DW then filed this application at encl 48 as reproduced earlier.

[11] The matter was heard on 27 September 2013 and this judgment is as regards that application. Effectively the application is for stay of the proceedings pending the decision of the court for the appeal against my decision dismissing encl 37.

[12] After having heard the submissions of both parties based on their written submissions, I am dismissing the application for the following reasons:

(a) the application for stay is as regards my earlier order dated 21 August 2013 at encl 1. It is common ground that after I had dismissed the DW's application at encl 37, her counsel left and did not partake in the proceedings at encl 1. Now, there is no appeal as regards encl 1. Section 73 of the Courts of Judicature Act 1964 (Act 91) provides the following:

> 73 Appeal not to operate as stay of execution
>
> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of appeal may direct.

The wording of that section is clear ie:

(a) an appeal shall not automatically operate as a stay of execution or of proceedings under the decision appealed from and;

(b) an application for a stay must be premised on the fact that the order to be stayed is under appeal.

[13] As was said earlier, the DW did not partake in the proceeding of encl 1 as her counsel had left soon after I had dismissed her application at encl 37. That proceeding for encl 1 was an inter partes proceeding but because DW's counsel left, I proceeded and gave the order dated 21 August 2013. Now, this is the order ie dated 21 August 2013 that the DW wants to stay pending her appeal against my decision at encl 37. Bear in mind that no one is appealing against my decision as regards encl 1. Therefore, applying s 73 of the Courts of Judicature Act 1964, there can be no stay granted especially so when there is no appeal against a decision made. Hence, on this ground, the DW's application at encl 48 is dismissed.

[14] In addition, as was stated in my judgment dated 22 August 2013, I had dismissed her application at encl 37 because I had relied on the Supreme Court case of *Wee Choo Keong v MBF Holdings & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 where I had quoted the judgment of the then Lord President Abdul Hamid bin Omar as follows:

Central in these appeals lies the important principle governing the rights, if any, of defendants who disobey orders of Court and then come forward to set aside the order disobeyed or to seek other relief from the Court.

Obedience to Court Order.

It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.

…

The recent decision of Abdul Malek J in *Instituto Bancario San Paolo Di Torina SPA v Colour Touch Sdn Bhd & Anor*, delivered on 5 February 1993 (see [1993] MLJU 547; [1993] 3 CLJ 34) was cited in support of the proposition that the rule would only apply where a writ of attachment or order of committal had been made. In our judgment, such a qualification on the application of the rule would be to place an unnecessarily low burden of obedience on the offending party. The rationale for the rule is public policy. Orders of Court must be treated with respect and require strict obedience.

In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

[15] As at the date of submission for encl 48 on 27 September 2013 the DW had still not complied with the order granted by this court on 21 August 2013. Hence, applying the principles enunciated in the case of *Wee Choo Keong*, this court cannot hear the DW's application at encl 48.

[16] Based on the above reasons, I am dismissing the DW's application at encl 48 with costs of RM5,000.

Defendant's application dismissed with costs of RM5,000.

Reported by Ashok Kumar